

**DEPARTMENT OF TRANSPORTATION**

OFFICE OF THE DIRECTOR

1120 N STREET

P. O. BOX 942873

SACRAMENTO, CA 94273-0001

PHONE (916) 654-5266

FAX (916) 654-6608

TTY (916) 653-4086

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May 1, 2006

Mr. Gene K. Fong, Administrator  
California Division  
Federal Highway Administration  
650 Capitol Mall, Suite 4-100  
Sacramento, CA 95814

Attention: Mr. Lance Yokota, Civil Rights Manager

Re: Letter of Intent to Change to a Race-Neutral DBE Program

Dear Mr. Fong:

Reference is made to your letter, GUIDANCE: FY 2006 DBE Goal Setting Approval Process and DBE Program Plans, which advised each state transportation agency to assess whether it has sufficient evidence of discrimination or its effects on transportation contracts in order to support a Disadvantaged Business Enterprise (DBE) race-conscious program. Absent sufficient evidence, the state transportation agency must revise its DBE Program to request approval to implement a wholly race-neutral program while it undertakes a more detailed assessment, such as a disparity study.

Per your direction, the California Department of Transportation (Department) gathered and considered past disparity studies, comments, and written evidence received during a 90-day public comment period ending March 20, 2006. While there is a suggestion of discrimination in some of the information received, after careful analysis, the Department, in consultation with your division staff, has concluded the data lacks sufficient evidence to satisfy the strict scrutiny and newly-established evidentiary standards set forth by the Ninth Circuit Court of Appeals in order to continue with a race-conscious DBE Program. Accordingly, effective May 1, 2006, the Department and its federal transportation assistance subrecipients will implement a DBE race-neutral program pending the results of a more comprehensive study of the facts.

The following factors led to the joint conclusion:

1. The data provided did not identify specific evidence of discrimination suffered by any of the presumptively disadvantaged groups identified in 49 CFR Part 26.5 in the transportation contracting industry in the State of California.
2. The available disparity studies conducted in California were limited in scope to a local government agency or a project, geographically and chronologically limited, and did not provide valid "statistical evidence" of discrimination in transportation contracting.
3. The anecdotal evidence related to transportation contracts in California could not be verified.

The overall California DBE goal to be achieved exclusively by race neutral measures is 10.5 percent for projects funded through the Federal Highway Administration (FHWA). The Department will identify an "Availability Advisory Percentage" on individual federal-aid contracts, which is intended to assist bidders in ascertaining DBE availability for items of work on a contract. The Department's contract specifications encourage bidders to utilize DBEs to aid the Department in achieving the statewide DBE goal.

As noted above, the race-neutral DBE Program may be an interim step, pending the results of an availability study and a disparity study to guide the Department's DBE Program in accordance with 49 Code of Federal Regulations Part 26. The Department is in the process of executing a contract with a consultant to complete an availability study and a disparity study required by FHWA to identify any evidence of discrimination that must be sufficient to withstand judicial scrutiny. The Department intended to execute the consultant contract on May 1, 2006, but has unfortunately received three bid protests from proposers. These protests must be resolved prior to contract execution and this process may take up to 30 days. In any event, we still anticipate the availability study will be completed within four months of contract execution and the disparity study by May 2007.

As required by FHWA guidance, a revised DBE Program Plan will be sent to your office for review and approval on or about May 8, 2006.

The Department has developed several channels of communication, which will be used simultaneously to announce this change to the Governor's Office, my Department employees, California legislators, external contracting partners, such as the Small Business Council and the Associated General Contractors of California, as well as local agencies that are subrecipients of FHWA funds.

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As you know, we have been working very closely with your Division Civil Rights Manager, Lance Yokota, and we will continue to seek his advice and guidance during this transition period and while the availability and disparity studies are being conducted. I wish to personally commend Lance for his dedication and hard work. We look forward to continuing our cooperative relationship.

If you have any questions, please contact me directly at (916) 654-5266.

Sincerely,



WILL KEMPTON  
Director